

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
1998 Biennial Regulatory Review -- Review of)
the Commission's Broadcast Ownership Rules)
and Other Rules Adopted Pursuant to Section)
202 of the Telecommunications Act of 1996)

MM Docket No. 98-35

To: The Commission

JOINT COMMENTS

The American Council on Education ("ACE"), the Association of Higher Education Cable Television Administrators ("AHECTA") and the Association for Telecommunications Professionals in Higher Education ("ACUTA") submit these Joint Comments in response to the *Notice of Inquiry* in MM Docket No. 98-35, FCC 98-37 (released March 13, 1998), dealing with the Commission's broadcast ownership rules. ACE, AHECTA and ACUTA urge the FCC to change Section 76.501 of its rules to make clear that the television/cable television cross-ownership ban does not prohibit colleges and universities from owning and operating noncommercial educational television stations and campus video distribution systems in the same areas.

The American Council on Education ("ACE") is the nation's umbrella higher education association, representing approximately 1,800 accredited, degree-granting colleges and universities from all sectors of higher education and other education and education-related organizations. Many of the ACE institutions are public broadcast licensees.

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The Association of Higher Education Cable Television Administrators ("AHECTA") is the professional association for college and university campus video system managers.

The Association for Telecommunications Professionals in Higher Education ("ACUTA") is an international association for college and university telecommunications professionals with headquarters in Lexington, Kentucky. The association represents approximately 1,000 higher education institutions and corporations. ACUTA members are responsible for the management of voice, data and video communications systems on college and university campuses.

Broadcast/Cable Cross-Ownership in Higher Education

Colleges and universities were pioneers in broadcasting in the United States, many of which began operating AM stations prior to the creation of the FCC. Today, a significant proportion of the country's noncommercial educational television ("NCE-TV") stations are licensed to and operated by colleges and universities, or by local or state agencies with formal ties to colleges and universities.

More recently, colleges and universities have moved forward to wire their campuses with telecommunications systems that have the capability, among other things, to deliver video programming to classrooms, administrative offices, dormitory rooms and other residences. Very often, in addition to educational programming, these video systems carry broadcast station and cable programming service signals. Institutions have developed these video systems with a number of goals in mind:

- With advances in technology and the increased use of video in the academic arena, institutions seek to provide students, faculty and staff with access to these academic resources of the institution;

--Due to the construction of campus buildings, reception of local television broadcast stations over the air is often difficult without centralized reception and wired distribution systems;

--Over the years, students in residence halls have increasingly demanded access to video entertainment services. These services are often available to students who live off campus. Research shows that living in a residence hall for at least a student's first year has a significantly positive effect on student academic performance and persistence to graduation. Thus, it is critical for institutions to provide environments in residence halls that will encourage students to live there. To do that, institutions believe that they must provide students living in residence halls with access to services similar to those available off-campus.

Applicability of Cross-Ownership Rule

With the increasing deployment of wired video systems on campuses, concerns have regularly developed among institutions about the applicability of the FCC's broadcast/cable cross-ownership rule. Section 76.501 denies any "cable system" the right to carry the signal of any television station if the system directly or indirectly owns, controls or has an interest in a TV station whose predicted Grade B contour overlaps any part of the service area of the cable system. In practice, this amounts to a cross-ownership prohibition.

Section 76.501 is interpreted by FCC staff as encompassing the cross-ownership of cable TV systems and NCE-TV stations. Therefore, institutions seeking to construct campus video systems in areas where they (or related entities) operate public TV stations have had only two choices: (1) restructure their video systems and operations in such a way as to avoid having

them classified as "cable systems;" or (2) seek a waiver of the cross-ownership restrictions.

Neither of these options are satisfactory. Restructuring systems merely to avoid classification as a cable system involves unnecessary expense and operational problems (such as the installation and maintenance of "street crosser" microwave systems) and/or sacrifices efficiencies and services. As for waivers, several institutions have sought waivers or clarification of the rule's applicability, but the FCC has been reluctant to rule on critical definitional issues and sometimes slow to react to waiver requests.^{1/}

Campus Video Systems Should Not Be Deemed Cable Systems

Several universities have urged the FCC to clarify that their video distribution systems are not cable systems for purposes of the Communications Act and the FCC's Rules because the typical campus system does not have "subscribers." Under Section 76.5 of the Rules, a "cable system" is defined as a "facility ... that is designed to provide cable service and which is provided *to multiple subscribers* within a community...." The term "cable service" also requires that such service be transmitted to subscribers. However, the definition of "subscriber" is "*a member of the general public* who receives broadcast programming distributed by a cable television system and does not further distribute it."

In the campus video system context, the intended recipients of the service, the institution's resident students, faculty and staff, are clearly not members of the general public.

^{1/} For example, Purdue University has had a request pending since 1994 for a determination that its campus video system is not a cable system. In 1997, the University of Arizona was fairly quickly granted a cross-ownership waiver with respect to its campus video system and NCE-TV stations, but the FCC staff declined to rule on whether its system is in fact a cable system. Ohio University has had a similar request pending at the FCC since October of 1997.

Institutions have no plans to offer service to the general public. Instead, they seek to serve a specific group of people selected and brought to the institution's campus for purposes of learning, research and socialization. It was partly on this basis, in Purdue University, 11 Rad. Reg. 2nd (P&F) 143, 144 (1967), that the FCC found a similar video distribution system not to be a cable system, stating that "the general public would not be offered the service." Unfortunately, the FCC staff has recently been unwilling to reaffirm the obvious logic of the Purdue case.

Moreover, a particular jurisdictional issue with respect to campus video systems has been whether the coaxial or fiber lines of a video distribution system use public rights of way. See, 47 U.S.C. Section 522(7)(B) and Section 76.5(a)(2) of the FCC's Rules. Often, on public university campuses, the precise legal status of a street as a "public right of way" is not clear. Also, it's unclear what is meant by "using" a public right of way, particularly where institutions run their cable through existing utility tunnels that may lie under streets.^{2/} These issues deserve clarification if there is to continue to be a campus cable/NCE-TV cross-ownership restriction.

In Any Event, There Should Be No Cross-Ownership Restriction

Even if the FCC were to declare some campus video systems to be "cable systems" (presumably, those using public rights of way), it should eliminate Section 76.501(a) of the Rules or make clear that it does not apply to colleges and universities that operate campus cable systems and NCE-TV stations in the same area.

^{2/} Cf. Guidry Cablevision v. City of Ballwin, 117 F.3d 383 (8th Cir. 1997) (holding that a SMATV system running cables under a public street does not necessarily "use" a public right of way under the applicable statutory provision).

In the past, the Commission has waived the cable/television cross-ownership rule when it has determined that the ban "will not result in greater diversity of viewpoints and strengthened economic competition." *Cablevision of Augusta*, 62 FCC 2d 184, 186 (1977); *See also, Second Report and Order*, 23 FCC 2d 816, ¶13 (1970). In the case of campuses, the diversity of programming is actually enhanced by the development of the video systems. Students are able to receive instructional and educational programming originated by the institution, as well as clear signals from local television broadcast stations and cable programming services. Students living on campuses can have access to the various programming alternatives available to students living off campus.

Campus cable systems also do not result in any harm to economic competition. The institutional television stations at issue here are noncommercial. As such, they do not compete economically with the other broadcast stations in the market. In the past, the Commission has found waivers of the television cable cross-ownership rule to be particularly appropriate where the television stations involved are noncommercial because they are "not engaged in economic competition vis-a-vis other media" in the area the cable system will serve. *All Clear TV*, 50 FCC 2d 693, 694 (1975).

Moreover, as already stated, rather than discriminate against other TV stations in carriage, one of the primary reasons institutions operate cable systems is to ensure that students receive a clear signal from all local television broadcast stations. In granting a requests for waiver of the cross-ownership rule, the Commission has also found that carriage of non-owned broadcast channels on a co-owned cable system "will assures that a multiplicity of views will be available

in the . . . communit[y]. . . and will guard against diminished competition in the market place of ideas." *See All Clear TV*, 50 FCC 2d at 694.

Conclusion

There is no reason why institutions of higher education in this country should be coming on an *ad hoc* basis to the Commission for clarification or waiver of its cross-ownership rules with respect to campus cable systems and NCE-TV stations. The Commission should use the opportunity of this proceeding to make clear that these systems are not "cable systems" or, at the minimum, that the cross-ownership rule does not apply to these systems and NCE-TV stations.

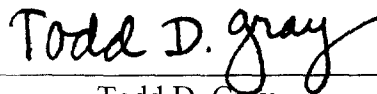
Respectfully submitted,

AMERICAN COUNCIL ON EDUCATION

THE ASSOCIATION OF HIGHER EDUCATION
CABLE TELEVISION
ADMINISTRATORS

THE ASSOCIATION FOR
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